

services

139 Questions have been raised about the appropriate charging structures for interconnection services, particularly how far alternatives to the standard 'per minute' unit for charging conveyance rates may be appropriate for current and new interconnection services. Capacity charging is one option which OFTEL and the industry have begun to discuss and there may well be other options as well. OFTEL intends to pursue this issue actively and will look to those in the industry in favour of change in this area to come forward with detailed proposals.

Future of ADCs

140 Many respondents to the consultative document urged that the future of ADCs should be reviewed as soon as possible. ADCs reflect the fact that, under its current tariff structure, BT recovers many of its access related costs through usage rather than standing charges. Related to this is the cost to BT of its universal service obligation (USO). In order for the ADC regime to be materially changed, BT's ability to recover its access deficit, including the question of rebalancing and the cost of the USO, would have to be considered. OFTEL has taken no decisions on what the appropriate way forward on these issues might be. Work will need to be carried out initially by discussion with BT. OFTEL would however propose to carry out a wide ranging consultative exercise before any final decisions are reached on the future of ADCs or who should contribute to the USO.

Addition of new interconnection services

141 Paragraphs 63 to 67 have already identified that some of the other operators requests for new interconnection services will need to be considered on a longer term timescale. The issues falling into this category are in List C at Annex H.

CONCLUSION

142 OFTEL believes that the implementation of the three stage programme in this statement will provide fair and transparent interconnection services vital to the continuing development of competition in the

telecommunications market and therefore to ensuring the best possible deal for the customer in terms of quality, choice and value for money. OFTEL looks forward to further extensive consultation with the industry and other interested parties in developing and implementing all aspects of the programme.

CANADA EQUIV.



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Report No. CC-568

COMMON CARRIER ACTION

April 5, 1994

FCC AFFIRMS THAT CANADA AFFORDS RESALE OPPORTUNITIES EQUIVALENT TO THOSE IN THE U.S.; AT&T DENIED RECONSIDERATION

The Commission has denied AT&T's petition for reconsideration and affirmed its previous finding that Canada affords resale opportunities equivalent to those available in the United States. The Commission also granted BT's request and clarified that the resale authorizations for private lines between the United States and Canada are limited to the carriage of U.S.--Canada traffic due to the Canadian policy requiring "maximum use of Canadian facilities."

AT&T requested reconsideration of the Commission's previous finding that Canada affords resale opportunities equivalent to those available in the United States, and the accompanying grant of the applications of FONOROLA Corporation and EMI Communications for authority to resell, inter alia, international private lines between the United States and Canada. AT&T argued that, in granting the applications of FONOROLA and EMI, the Commission had focused solely on the issue of nondiscrimination and did not undertake a comparative analysis of the resale opportunities available within Canada and the United States, thus misapplying the equivalency test. In the alternative, AT&T asked the Commission to adopt new traffic reporting and monitoring measures for international private line resellers.

On November 4, 1992, the Commission granted FONOROLA and EMI authority to resell, inter alia, international private lines between the United States and Canada for the provision of switched services. These authorizations represented the first time that the Commission applied its International Resale Order to authorized resale of private lines only to countries determined to afford resale opportunities equivalent to those available in the United States. In the International Resale Order, the Commission concluded that the public interest in cost-based international telecommunications services will be served by encouraging the resale of international telecommunications services, including private lines. The Commission further stated that it expects the resale of international private lines to exert downward pressure on high collection and above-cost accounting rates.

(over)

In an effort to safeguard the U.S. public interest against the negative impact of "one-way" resale, the Commission conditioned its policy by requiring international private line resale applicants to demonstrate that resale opportunities equivalent to those available under U.S. law are afforded by the destination foreign country.

In the MONROVIA/EMI Order, the Commission concluded that the licensing scheme, tariffing requirements, ability to interconnect to the public switched network at both ends, terms and conditions for resale of WATS/volume discount services, line-side access coupled with discounted contribution charges, and foreign ownership policy in Canada provide equivalent opportunities for U.S.-based resellers to enter and participate effectively in the Canadian resale market.

Therefore, upon consideration of the complete record, the Commission determined that Canada affords equivalent private line resale opportunities.

With respect to AT&T's alternative proposal, the Commission stated that adoption of AT&T's proposed monthly traffic reporting and monitoring measures would frustrate the broader goal of its International Resale Order, to further competition in the international resale market in order to obtain the public benefit of cost-based telecommunications services. However, the Commission has recognized that there is a significant time delay between the initiation of resale services and the filing of current annual traffic data reports. Therefore, the Commission adopted a requirement that all international private line resellers file certain traffic reports on a semi-annual basis during the first three years of an equivalency finding.

Action by the Commission April 4, 1994, by Order on Reconsideration (FCC 94-81). Chairman Hundt, Commissioners Quello and Barrett.

-FCC-

News Media contact: Patricia A. Chew at (202) 632-5050.
Common Carrier Bureau contact: Jennifer A. Warren and Susan O'Connell at (202) 632-3214.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of

fONOROLA Corporation File No. I-T-C-91-103

Application for Authority
Under Section 214 of the
Communications Act to Resell
Facilities of Other Common
Carriers to Provide Domestic
Carriers Interconnection
with Canadian Carriers.

and

EMI Communications File No. I-T-C-91-050
Corporation

Application for a Certificate
of Public Convenience and
Necessity Pursuant to
Section 214 of the Communications
Act as amended, to Provide
International Communications
Service between the United States
and Canada on a Resale Basis.

**MEMORANDUM OPINION, ORDER
AND CERTIFICATION**

Adopted: October 8, 1992; Released: November 4, 1992

By the Commission: Commissioner Quello concurring in
result.

I. INTRODUCTION

1. The Commission has before it the above-captioned applications from fONOROLA Corporation (fONOROLA) and EMI Communications Corporation¹ (EMI) seeking authorization, pursuant to Section 214 of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. § 214, to resell international private line and switched services between the United States and Canada. Pursuant to our *International Resale Order*,² we require applicants seeking to resell international private line services to demonstrate that equivalent resale opportunities exist in the country at the other end of the private line. The applications before us request that we make the determination that Canada affords the requisite equivalency of resale opportunities. Based upon the evidence submitted in the record, we find that such equivalent resale opportunities exist in Canada for resellers seeking to provide service between the United States and Canada. We accordingly grant fONOROLA and EMI authorization to provide their requested services, subject to the conditions set forth below.

II. BACKGROUND

2. In the *International Resale Order*, we found that a policy encouraging the resale of international telecommunications services would further the public interest in cost-based international telecommunications and more efficient use of international facilities. Specifically, we concluded that a more liberal policy toward the resale of international private lines to provide switched voice services would allow new entrants in the market and exert a downward pressure on above-cost international accounting rates and overseas collection rates through the diversion of switched traffic to resold private lines.³ We therefore authorized the resale of international private lines to any country that offered equivalent resale opportunities.

3. At the same, however, we concluded that permitting "one-way resale", i.e., resale only from the overseas point inbound to the United States, would have the undesirable effect of undermining the goals and benefits of our new policy. Such "one-way resale" could enable foreign carriers or administrations unilaterally to divert U.S. inbound switched traffic, for which U.S. carriers normally receive settlements payments under the international settlements policy,⁴ to private lines, thereby evading the settlements process for that traffic.⁵ By contrast, absent the opportunity to resell private lines in the reverse direction from the U.S. to the foreign country, U.S. carriers would necessarily con-

¹ On May 1, 1992 Eastern Microwave, Inc. changed its name to EMI Communications Corporation.

² In the Matter of the Regulation of International Accounting Rates Proceeding, Phase II, First Report and Order, (*International Resale Order*), 7 FCC Rcd 559 (1991) *recon. pending*.

³ See *International Resale Order* at 560.

⁴ The International Settlements Policy (ISP) requires uniform settlement rates, accounting rates and division of tolls for U.S. international carriers on parallel routes. The aim of the ISP is to prevent foreign telecommunications administrations from "whipsawing" U.S. carriers, or playing carriers off against each other to the disadvantage of the U.S. carriers and U.S. ratepayers. See *Mackay Radio and Telegraph Company, Inc.*, 2 FCC 392 (1936), *aff'd by the Commission en banc*, 4 FCC 150 (1937), *aff'd sub nom. Mackay Radio and Telegraph Co. v. F.C.C.*, 97 F.2d 641 (D.C. Cir. 1938).

⁵ This would occur because a foreign-based resale carrier could lease both the foreign and U.S. halves of an international private line and use that line to carry inbound traffic into the United States and hand it off to a domestic U.S. carrier through a connection to the U.S. public switched telephone network (PSTN). Although the Commission's rules do not explicitly subject international private line resale to the Commission's ISP, we note that on February 5, 1990, AT&T filed a petition for declaratory ruling seeking, *inter alia*, a Commission determination that U.S.-based carriers must comply with the Commission's ISP when providing an "IMTS option" over an international private line. See AT&T Petition for Expedited Declaratory Ruling, CC Docket 86-494 (February 5, 1990). This petition is still pending.

tinue to route outbound traffic over switched lines, thus continuing to pay above-cost international accounting rates subject to the ISP. Permitting such unilateral evasion of the settlements process would not only exacerbate the U.S. settlements deficit, it would also fail to put downward pressure on international accounting rates and overseas collection rates, thereby frustrating the policy goals behind the encouragement of international private line resale. Accordingly, we authorized resale only to countries that allow resale to occur in both directions so that the benefits of resale would inure to both U.S. and foreign ratepayers. We therefore required that each applicant seeking to resell international private lines demonstrate that the subject foreign country affords resale opportunities equivalent to those available under U.S. law.⁹ To comply with Section 63.01(k)(5) of our Rules, both applicants filed amended applications seeking to show that equivalent resale opportunities exist in Canada.

4. FONOROLA is a corporation chartered in the United States seeking authorization to become an international common carrier providing U.S. - Canada service by reselling the services of authorized facilities-based international common carriers. FONOROLA proposes to lease private lines from U.S. carriers and to use them for the provision of international message telephone service (IMTS), facsimile and data services, on a resale basis.¹⁰ To this end, FONOROLA seeks to offer U.S. domestic common carriers access to Canadian carriers at border crossing points and Canadian carriers access to U.S. carriers' points of presence (POPs). As FONOROLA is wholly-owned by FONOROLA, Inc., a Canadian telecommunications entity, it is a foreign-owned carrier under the Commission's decision in *International Competitive Carrier*,¹¹ and, thus, would be regulated as dominant in its provision of international common carrier services between the United States and Canada.

5. EMI, a nondominant, U.S.-owned common carrier, is authorized to provide non-IMTS video and associated audio services between the U.S. and Canada. EMI seeks authority to resell international private lines leased from U.S. and Canadian carriers for the provision of 800 service to Canada.¹² EMI also seeks authority to provide international switched voice, facsimile and data services by reselling the international switched voice service set forth in AT&T's Tariff FCC Nos. 1 and 2, U.S. Sprint's Tariff FCC Nos. 1 and 2 and MCI's Tariff FCC No. 1 between the U.S. and all international points listed in those tariffs.

6. We placed the above-captioned applications on public notice on May 1, 1991, and January 25, 1991, respectively, and received no comments. The amended applications which both FONOROLA and EMI filed to meet the requirements of the *International Resale Order* were placed on public notice in April 1992. American Telephone and Telegraph (AT&T) initially filed Comments on FONOROLA's amended application, but subsequently opposed both the FONOROLA and EMI amended applications.¹³

7. The FONOROLA and EMI applications present the first occasion for this Commission, pursuant to the *International Resale Order*, to determine whether there are equivalent private line resale opportunities for U.S.-based carriers in a foreign country.¹⁴ In the *International Resale Order*, we declined to adopt specific criteria for determin-

III. DISCUSSION

7. The FONOROLA and EMI applications present the first occasion for this Commission, pursuant to the *International Resale Order*, to determine whether there are equivalent private line resale opportunities for U.S.-based carriers in a foreign country.¹⁵ In the *International Resale Order*, we declined to adopt specific criteria for determin-

⁹ Section 63.01(k)(5) provides, in pertinent part:

"... If proposed facilities are to be acquired through the resale of private lines for the purpose of providing international services, applicant shall demonstrate for each country to which it seeks to provide service that that country affords resale opportunities equivalent to those available under U.S. law. ..."

¹⁰ Specifically, FONOROLA seeks to lease 54 DS-1 circuits from Canada to the United States and 2 DS-1 circuits from the United States to Canada, pursuant to AT&T Tariffs F.C.C. Nos. 9 and 11, Sprint Tariffs F.C.C. Nos. 5 and 7 and MCI/Western Union International Tariff F.C.C. No. 27.

¹¹ 102 FCC 2d 812, 842 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986). On October 8, 1992, the Commission adopted a proposal to modify its current policy of treating foreign-owned U.S. common carriers as dominant in their provision of all international services to all foreign markets in favor of a policy that regulates all U.S. international carriers, whether U.S.- or foreign-owned, as dominant only on those routes where their foreign affiliate has the ability to discriminate against unaffiliated U.S. international carriers in the provision of access to bottleneck facilities and services. See *Regulation of International Common Carrier Services*, CC Docket 91-360, Report and Order, FCC 92-_____, adopted October 8, 1992. However, the Order will not become effective until 90 days after publication in the Federal Register. Under procedures specified in that Order, FONOROLA may seek to modify its dominant regulatory status on the U.S.-Canada route.

¹² EMI proposes to provide this service via four T-1s leased from Qwest Microwave VII, Inc., an authorized common carrier (see File No. I-T-C-90-186, granted September 6, 1990) and one

DS-1 leased from Unitel, a Canadian carrier. These leased lines will be used in conjunction with EMI's own domestic facilities in the U.S.

¹³ AT&T filed Petitions to Deny the amended applications of both FONOROLA and EMI, to which both applicants filed Oppositions. EMI also filed a Motion to Supplement. AT&T then replied to both Oppositions and EMI's Motion. Subsequently, the Canadian Embassy and Sprint Communications Company, L.P. (Sprint) submitted *ex parte* letter filings in support of the FONOROLA application (letter to Chairman Alfred C. Sikes, Federal Communications Commission from Marc A. Brault, Charge d'Affaires, Canadian Embassy, dated August 20, 1992) (letter to Donna R. Searcy, Secretary, Federal Communications Commission from Michael B. Fingerhut, General Attorney, Sprint, dated September 11, 1992). AT&T's Petition to Deny the FONOROLA application was filed after the due date, along with a request to accept this late-filed petition. We grant AT&T's request because FONOROLA's application and AT&T's petition raise new and novel issues which require a full and complete record, and we find that the public interest would be served by accepting AT&T's petition, along with the applicant's responses, into the record.

¹⁴ The requirement for equivalent resale opportunities to exist between the United States and Canada does not implicate the 1988 U.S.-Canada Free Trade Area agreement (CFTA) or the recently concluded North American Free Trade Area agreement (NAFTA). Provision of telecommunications services through resale is a form of "basic" service. The CFTA does not apply to the provision of basic services. Under the NAFTA, the three governments -- Mexico, Canada and the United States -- took reservations that amount to an exclusion of basic services from the trade principles of the NAFTA.

ing whether equivalency exists in a particular foreign country. We stated that licensing, tariffing and other terms and conditions which may be associated with the provision of service would be among the factors a party might wish to address in trying to show equivalency.¹² However, we did indicate that for equivalency to exist the subject foreign country must, at a minimum, permit open entry for, and nondiscriminatory treatment of, U.S.-based carriers. Indeed, we emphasized that the prices, terms and conditions afforded U.S.-based resellers should be equivalent to those made available to foreign-based resellers providing service in their country.¹³

8. Pursuant to Section 63.01(k)(5) of our Rules, the applicants each submitted information and documentation intended to show that equivalent resale opportunities exist in Canada. As a threshold issue, AT&T asserts that neither applicant has addressed the factors necessary to demonstrate equivalent resale opportunities under Section 63.01(k)(5).¹⁴ The applicants' submissions address equivalency in Canada in terms of open entry, non-discriminatory treatment in the application of general tariffs and contribution charges, and the ability to interconnect to the public switched telephone network (PSTN) at both ends. The applicants claim these factors are sufficient to demonstrate that overall Canada affords U.S.-based carriers resale opportunities equivalent to those available under U.S. law, as required by our *International Resale Order*. They argue that requiring point-by-point equivalency as AT&T suggests, rather than a broad equivalency, would result in no determinations of equivalency, thereby denying the public the significant

benefits associated with international resale. Upon review, we find that the applicants have satisfied the showing required in Section 63.01(k)(5).

9. The applicants first claim that an open and competitive resale market already exists in Canada. They argue that the various decisions¹⁵ issued by the Canadian Radio-television and Telecommunications Commission (CRTC) which collectively describe the regulatory regime applied to resellers in Canada demonstrate that Canada has a policy of open entry for resellers. As additional evidence, fONOROLA submits an outline of this regime provided by the Office of the Secretary General of CRTC.¹⁶ These documents indicate that CRTC requires resellers – whether Canadian or foreign-owned – to register with the CRTC and the underlying carrier prior to beginning service,¹⁷ file tariffs,¹⁸ and pay contribution charges for interconnecting circuits to the PSTN.¹⁹ The applicants assert that these regulatory procedures have not proved to be a barrier to entry in the Canadian resale market. In fact, fONOROLA notes that there are approximately 80 resellers operating in Canada, 10 of which are U.S.-based resellers.²⁰

10. As additional evidence that Canada allows U.S.-based carriers open and nondiscriminatory entry, the applicants cite CRTC Decision 91-21 in which it is stated that Canadian government policy applies no ownership restrictions on persons acting as resellers in Canada.²¹ Therefore, U.S.-based carriers have the same opportunity to enter the Canadian resale market as Canadian carriers. AT&T notes, however, that the draft Telecommunications Act, now pending in Parliament, would impose foreign ownership restrictions on common carriers.²² Although we share AT&T's concern that the draft Telecommunications Act may impose foreign ownership restrictions on resellers, it is

¹² *International Resale Order* at 562.

¹³ *Id.*

¹⁴ Although our review of each application is on a case-by-case basis, the substance of AT&T's petitions relates to the common issue of equivalency for Canada. Thus, we consolidate our discussion of the issue of equivalent resale opportunities and AT&T's related arguments.

¹⁵ The relevant CRTC Decisions which have progressively liberalized the Canadian resale market are *Resale and Sharing of Private Line Services*, Telecom Decision 90-3 (1990) (CRTC Decision 90-3); *Teleglobe Canada Inc. - Regulation after the Transitional Period*, Telecom Decision 91-21 (1991) (CRTC Decision 91-21); *Application of TWU - Status of Resellers Under the Railway Act*, Telecom Decision 92-11 (1992) (CRTC *Reseller Status Order*); and *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*, Telecom Decision 92-12 (1992) (CRTC *Competition Order*). The recent CRTC *Competition Order* not only further liberalized Canada's resale policy, it also extended the geographic scope of permitted resale to encompass approximately 90 percent of telecommunications traffic in Canada. While resellers can originate traffic in 90% of Canada, they can terminate traffic throughout all of Canada. See fONOROLA, *ex parte* filing of September 15, 1992. As this liberalized resale policy now applies to the provinces giving rise to approximately 90 percent of Canadian traffic and also allows terminating capability throughout Canada, we believe this constitutes an adequate basis for making an equivalency finding.

¹⁶ Letter to Jan Peeters, President, fONOROLA from R. Chisholm for A.J. Darling, Secretary General, CRTC (June 16, 1992). See fONOROLA's Opposition, Attachment.

¹⁷ See fONOROLA Application at 4. fONOROLA specifically asserts that registration for a reseller in Canada consists solely of an approximate one-week notification process, as compared to

the U.S. requirement that resellers file an application for a Section 214 authorization which must be placed on thirty-day public notice. See fONOROLA *ex parte* filing of September 15, 1992.

¹⁸ Recently, CRTC determined that resellers engaged in providing interprovincial service and in control of routing are "companies" under the Canadian Railways Act and thus fall within its jurisdiction; as an immediate result, such resellers are required to file tariffs by October 4, 1992. See CRTC *Reseller Status Order*, *supra* at note 15. We also note that CRTC has adopted a new tariff approval procedure which will permit approval on same day as filed.

¹⁹ See CRTC Decision 90-3. Contribution charges, which are the rough equivalent of access charges in the United States, are not applied to data services; WATS or MUX services; local voice, non-interconnected interexchange voice, and dedicated interconnected interexchange voice services; and private lines for private line services. See CRTC *Competition Order*, at note 15. In addition to contribution charges, AT&T claims that there are separate "access charges" applicable to resellers providing service between the United States and Canada; however, the CRTC *Competition Order* indicates that no such additional charges apply.

²⁰ See fONOROLA *ex parte* filing of September 15, 1992.

²¹ See CRTC Decision 91-21, at note 15.

²² Telecommunications Bill C-62 (draft of February 27, 1992). The draft is unclear as to whether and under what circumstances those restrictions might be applied to resellers. However, we note that Bill C-62's definition of transmission facility, to which Canadian foreign ownership restrictions do apply, is intended to exclude switching apparatus. See Letter from Michael Helm, Director General of Telecommunications Policy, Department of Communications to Astrid Pregel, Canadian Embassy, dated September 28, 1992.

premature to speculate on the outcome of the Parliamentary debate on this legislation. However, authorizations granted pursuant to an equivalency finding are subject to the condition of possible modification or revocation if, upon review, we determine at a future date that equivalent resale opportunities no longer exist in Canada.

11. In addition to flagging the foreign ownership question, AT&T asserts that the CRTC *Competition Order*, while a liberalizing step for the Canadian resale market, does not address certain other concerns²³ that may create further hindrances to equivalent resale opportunities being available in Canada. AT&T specifically expresses concern that the Canadian policy of a 20 percent foreign ownership restriction for facilities-based carriers may apply to the CRTC's category of "hybrid reseller".²⁴ The term "hybrid reseller" refers to carriers that operate in Canada through a mix of leased and owned transmission facilities, as opposed to carriers which operate solely through the transmission facilities of an underlying carrier. While we recognize that the regulatory treatment of "hybrid resellers" may have ramifications for competition in the Canadian resale market, we note that neither of the applicants before us falls within this CRTC category, and the record in this proceeding does not adequately address this issue.²⁵ Therefore, as neither applicant qualifies as a "hybrid reseller" in Canada, we need not address this issue in the context of this ruling's equivalency finding.²⁶

12. AT&T also contends that the terms and conditions attached to the resale of WATS/discount toll services²⁷ and the level of contribution charges that resellers must pay limit the ability of U.S. resellers to operate in Canada and, thus, calls Canadian equivalency to the U.S. market into question. These considerations, however, apply equally to U.S. and Canadian resellers. Moreover, they apparently have not prevented a large number of resellers, including U.S. based carriers, from operating and competing in

Canada.²⁸ The evidence thus indicates that these terms and conditions for the resale of WATS/discount toll services and contribution charges are administered on a non-discriminatory basis, and do not appear to create a significant impediment to competitive entry and operation in the Canadian resale market.²⁹ We therefore conclude that these concerns are not sufficient to preclude a finding of equivalent resale opportunities existing between Canada and the United States.

13. The second major factor emphasized by the applicants is that the conditions placed on operation in the Canadian resale market are administered without discrimination based on a carrier's country of origin. Indeed, AT&T apparently agrees with the applicants that the CRTC decisions and tariff language indicate that the registration requirements, general tariffs and contribution charges will be administered on a nondiscriminatory basis.³⁰ We also note that CRTC requires that all Canadian telephone company services and facilities available to resellers, including interconnection, be made available to competitors at general tariff rates.³¹

14. Finally, the applicants argue that Canada offers equivalent resale opportunities because all resellers may interconnect private lines to the Canadian PSTN under the same terms and conditions.³² While AT&T does not dispute the legal ability to make such interconnections, it argues that equivalency must also include the ability of the reseller to control technical routing of traffic. AT&T observes that CRTC's policy to require the "maximum use of Canadian facilities" prohibits resellers from (i) transporting traffic destined between two points in Canada via the United States, or (ii) routing Canadian-originated international traffic via lower-cost routes through the United States.³³ However, as AT&T notes, U.S.-originated traffic destined

²³ AT&T suggests that action on these applications would be premature in light of the court stay and scheduled October appeal of two sections of the CRTC *Competition Order* relating to (i) the Canadian telephone companies' inability to receive compensation for costs for allowing interconnection to their networks, and (ii) new entrants receiving discounts on contribution charges. However, these aspects appear to relate only to facilities-based carriers. Although AT&T also includes the Petition for leave to appeal CRTC's *Reseller Status Order* as an argument to withhold action on these applications, we note that the court has dismissed this Petition.

²⁴ See CRTC *Competition Order* at note 15.

²⁵ Neither fONOROLA nor EMI appears to own facilities in Canada.

²⁶ We may review the status of the Canadian resale market and the scope of our equivalency finding as new decisions, policies and legislation are adopted.

²⁷ AT&T had initially raised the issue of the prohibition of resale of WATS and other discount toll services within Canada as a potential economic barrier to market entry because of distribution costs for calls within Canada. However, pursuant to the *Competition Order*, WATS and other discount toll services may now be resold in Canada as in the United States. AT&T has since indicated that it would be premature to act on these applications until the tariffs for the resale of WATS and other volume discount services were actually implemented. The Canadian Department of Communications has confirmed that these tariffs have been filed with the CRTC and are in effect.

²⁸ See supra n.20 and accompanying text. AT&T's own com-

ments reveal that market conditions in Canada already support competition among a number of resale carriers, including some U.S.-based carriers. See AT&T Comments at 2.

²⁹ Moreover, we note that the scope of the services permitted to be resold in Canada appears to be equivalent to that in the United States.

³⁰ AT&T does not argue that any current Canadian laws or regulations discriminate against U.S.-based resellers.

³¹ See fONOROLA's Opposition, Attachment.

³² In recent *ex parte* filings dated August 26 and September 15, 1992, AT&T argues that we should condition an equivalency finding upon the adoption of an "equal access" plan for resellers in Canada, including tariffs authorized to allow trunk side access and the availability of "1+" dialing for the resellers. We agree with AT&T that trunk side access for resellers in the Canadian market would be preferable to line side access, which requires seventeen digit dialing. However, no reseller -- Canadian or foreign-based -- can get "equal access" in Canada. Further, we note that resellers receive discount contribution charges as compensation for the line side, or non-equal access interconnection. Since there are 80 Canadian and foreign-based resellers operating in the Canadian market, it appears that line side access, coupled with the discounted contribution charges, has not precluded the creation of a competitive resale market. Therefore, we find that the lack of equal access is not sufficient to prevent an equivalency determination. We note, however, that CRTC has just recently received an application on the issue of trunk side access and has placed it on public notice.

³³ See CRTC Decisions 91-10 and 91-21. AT&T Petition to Deny fONOROLA application, p. 3.

either for overseas or the U.S. may be routed through Canada. AT&T contends this Canadian policy precludes a finding of equivalency.

15. While we do not endorse Canada's policy of requiring "maximum use of Canadian facilities", we note that all carriers, whether Canadian- or foreign-based, are subject to this routing restriction. Moreover, we find no benefit in the adoption of a blanket restriction on traffic routing in the U.S. to mirror Canada's restrictive policy. Yet, with respect to the routing of third-country traffic, we recognize that allowing the resale of private lines to transport U.S.-originating or -terminating traffic through Canada would allow circumvention of our *International Resale Order* by permitting service to or from countries not yet determined to be equivalent.³⁴ The net effect would be "one-way" resale between the U.S. and those third countries, a result we have consistently sought to avoid. In order to safeguard against the circumvention of our *International Resale Order*, we find it necessary to adopt a policy with respect to international private line resale between the United States and Canada that prohibits the routing of U.S.-overseas traffic through Canada.³⁵ This approach should prevent evasion of the international settlements process between the United States and third countries and circumvention of our requirement that a foreign country afford equivalent resale opportunities.³⁶ Accordingly, all authorizations for the resale of international private lines between the United States and Canada will be subject to the condition that the traffic carried over such private lines be limited to U.S. - Canada traffic only, that is, traffic originating in the United States and terminating in Canada or traffic originating in Canada and terminating in the United States.³⁷ In addition, all such authorizations are also subject to the "no exclusive arrangements" condition set forth below in paragraph 23.

16. Based upon our review of the record, we find that the current legal, regulatory and market circumstances in Canada which provide open entry for, and nondiscriminatory treatment of, U.S.-based carriers, coupled with the conditions set forth below, support a finding of equivalent resale opportunities in the context of the applications before us. Given our policy of encouraging resale of international switched services, and private line services where equivalent resale opportunities are available, we find that the public interest is served by the grant of FONOROLA's and EMI's applications, subject to the conditions set forth below.³⁸

IV. ORDERING CLAUSES

17. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of resale of international private line services between the United States and Canada.

18. Accordingly, IT IS HEREBY ORDERED that applications File Nos. I-T-C-91-103 and I-T-C-91-050 ARE GRANTED, and (i) FONOROLA is authorized to resell international private lines for the provision of IMTS, facsimile, and data services between Canada and the United States on a resale basis and (ii) EMI is authorized to resell international private lines for the provision of its 800 service from the United States to Canada on a resale basis.

19. IT IS FURTHER ORDERED that FONOROLA and EMI, respectively, are authorized to lease 56 DS-1 circuits and 4 T-1 circuits pursuant to tariff for the provision of their authorized resale of international private lines for switched services between the United States and Canada.

20. IT IS FURTHER ORDERED that EMI is authorized to provide international switched voice, facsimile and data services by the resale of international switched voice services taken pursuant to the tariffs of authorized international common carriers between the United States and the international points listed in the relevant tariffs.

21. IT IS FURTHER ORDERED that the grant of application File No. I-T-C-91-103 is subject to the condition that FONOROLA will be classified as dominant in the provision of its authorized services between the United States and Canada, subject to modification pursuant to our ruling in CC Docket 91-360.

22. IT IS FURTHER ORDERED that the authority granted herein to resell private lines between the United States and Canada is limited to the provision of the authorized services between the United States and Canada only -- that is, private lines which carry traffic that originates in the United States and terminates in Canada or traffic that originates in Canada and terminates in the United States.

23. IT IS FURTHER ORDERED that neither the applicants nor any persons or companies directly or indirectly controlling them or controlled by them, or under direct or indirect common control with either of them, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which either applicant or any such persons or companies are parties.

³⁴ We note that the prohibition on routing Canada-Canada traffic through the U.S. does not raise the same concerns of evasion of our *International Resale Order* given that we are herein authorizing the resale of private lines between the United States and Canada.

³⁵ In its Opposition, FONOROLA indicates that it would be willing to accept a condition prohibiting the routing of U.S. originated traffic via Canadian private lines to third countries.

³⁶ As noted in the *International Resale Order*, any violation of our international resale policy may be challenged at any time by either the Commission or an interested person. Moreover, we have authority through Sections 312(b) and 503 of the Communications Act and our international settlements policies to take corrective action to address any such violations.

³⁷ We believe that by limiting these resellers to providing

service between the United States and Canada only, we are responding to AT&T's concerns regarding the potential negative impact of allowing routing of U.S.-third country traffic through Canada and any foreign carrier affiliation between a Canadian-based applicant and a third country carrier.

³⁸ We recognize that authorization of international private line resale in both directions could have an impact on the net settlement payments because switched traffic to and from the United States which is included in the settlements process is likely to be diverted to private lines. However, the relatively low level of accounting rates for telephone service between the United States and Canada should help to minimize the impact on the U.S. net settlement payments to Canada. We note here that the accounting rates with Canada are at a level significantly lower than with any other foreign correspondent relation.

24. IT IS FURTHER ORDERED that both applicants shall file copies of any operating agreements entered into by the applicants, and fONOROLA, as a dominant carrier, shall file copies of such agreements entered into by parent/affiliate companies that affect traffic or revenue flows to or from the United States within 30 days of their execution.

25. IT IS FURTHER ORDERED that the applicants shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this Order.

26. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

27. IT IS FURTHER ORDERED that fONOROLA, as a dominant carrier, shall request Section 214 authorization for all circuit additions to Canada, pursuant to Section 63.01 of the Rules, 47 C.F.R. §63.01.

28. IT IS FURTHER ORDERED that EMI shall file semi-annual reports of circuit additions to certificated points, pursuant to Section 63.10 of our Rules, 47 C.F.R. §63.10.

29. IT IS FURTHER ORDERED that fONOROLA, as a dominant carrier, shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and Canada within 90 days from the end of each calendar quarter.

30. IT IS FURTHER ORDERED that the applicants shall file all arrangements for private line interconnection to the U.S. public switched network, pursuant to Section 43.51(a) of our Rules, 47 C.F.R. §43.51(a).

31. IT IS FURTHER ORDERED that grant of these authorizations is conditioned upon Canada's continuing to afford resale opportunities equivalent to those afforded under U.S. law.

32. This Order is effective upon adoption. Petitions for reconsideration under Section 1.106 of the Commission's Rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

NON-DOMINANCE

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NEWS

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1975).

Report No. DC-2244

ACTION IN DOCKET CASE

October 8, 1992

REGULATION OF INTERNATIONAL COMMON CARRIERS MODIFIED (CC DOCKET 91-360)

The Commission has modified its International Competitive Carrier policy to apply dominant carrier regulation to U.S. carriers, whether U.S.- or foreign-owned, only on those international routes where an affiliated foreign carrier has the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck facilities and services in the foreign market.

The new rules will provide significant consumer benefits, relieve U.S. carriers of unnecessary regulatory burdens, and continue to protect U.S. carriers from discrimination in access to foreign markets. These rules deal only with the manner in which U.S. international carriers will be regulated once they obtain authority to operate in the U.S. market. The modified policy does not address the standards applied by the Commission in determining whether to authorize entry.

The current rules, adopted in 1985, treat "foreign-owned" U.S. common carriers as dominant in their provision of all international common carrier services to all foreign markets. As "dominant" carriers, foreign-owned U.S. carriers must obtain Commission approval before adding circuits on certificated routes; file cost support with their tariffs, which are effective only after 45 days' notice; and report quarterly on traffic and revenues. Nondominant carriers, however, merely notify the Commission of circuit additions on a semi-annual basis; may implement tariffs on 14 days' notice and need not file cost support; and file annual traffic and revenue reports.

Specifically, for purposes of determining a carrier's regulatory classification, assuming such carrier has already been granted permission to operate in the U.S. market, the Commission:

- Will treat a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with, a foreign carrier. The Commission will rely on a case-by-case analysis for determining control, rather than a "presumption of control" benchmark test;

- Will implement a proposal by the National Telecommunications and Information Administration under which (i) U.S. carriers with no affiliated carrier in the destination country will presumptively be classified as nondominant for that route; (ii) U.S. carriers affiliated with a monopoly carrier in the destination country will presumptively be classified as dominant for that route; and (iii) U.S. carriers affiliated with a foreign carrier that does not have a monopoly in the destination country will receive closer scrutiny by the FCC for that route;

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- 2 -

-- Will require each affiliated U.S. carrier to certify in its Section 214 applications filed with the Commission that it will not agree to accept special concessions from any foreign carrier or administration on any international route. This requirement will provide a strong disincentive for an affiliated U.S. carrier to attempt to gain an unfair competitive advantage on unaffiliated routes;

-- Will presumptively treat as nondominant all U.S. international carriers, regardless of any foreign affiliations, that provide service on a particular route solely through the resale of an unrelated U.S. facilities-based carrier's switched services; and

The Commission also decided that it will implement a streamlined grant procedure for a class of non-controversial resale applications.

These new rules will not modify the dominant carrier status of AT&T, Comsat, or U.S. carriers that provide international service for non-contiguous domestic points. The modified policy will promote the Commission's objective to encourage competition by redirecting regulation to those instances where a U.S. carrier's operations may require closer scrutiny.

Action by the Commission October 8, 1992, by Report and Order (FCC 92-463). Chairman Sikes, Commissioners Marshall, Barrett and Duggan with Commissioner Quello concurring in the result. Commissioner Quello issued a statement and Commissioners Marshall and Duggan issued a joint statement.

- FCC -

News Media contact: Rosemary Kimball at (202) 632-5050.

Common Carrier Bureau contact: Susan Lee O'Connell or Diane Cornell at (202) 632-3214.

Office of International Communications contact: Kathleen J. Collins at (202) 632-0935.

**SEPARATE STATEMENT OF
COMMISSIONER JAMES H. QUELLO**

**RE: Regulation of International Common Carrier Services
(CC Docket No. 91-360)**

I am concurring with the majority in adopting this item. Today, the Commission is adopting a regulatory approach for classifying international carriers as either dominant or non-dominant. The route-by-route approach contained in this item should also be applied to AT&T, and I would have expanded the scope of this Order to cover AT&T. Pursuant to today's Order, foreign owned carriers operating in the U.S. can be regulated as non-dominant, while AT&T remains regulated as dominant. It is important to ensure that all carriers competing in the marketplace are provided with the opportunity to compete on a level playing field. I am also concerned that this item could increase the Commission's burden in reviewing complex cases concerning whether individual foreign carriers have market power. In addition, it raises serious questions regarding the Commission's ability to enforce our regulations. I concur in this item with the understanding that the regulatory classification of specific countries and individual carriers will be subject to full Commission review.

October 8, 1992

JOINT STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL
AND COMMISSIONER ERVIN S. DUGGAN

Re: Regulation of International Common Carrier Services
(CC Docket No. 91-360, RM-7578)

We are voting for this item for only one reason: its scope is so narrow that it should not hamstring U.S. negotiations on larger international telecommunications issues. Today's decision simply implements an improved regulatory scheme for determining whether an international common carrier operating within the U.S. should be regulated as dominant or nondominant. It does not address the question of under what circumstances foreign-owned carriers may be granted entry into the U.S. market. In short, this decision simply takes care of the regulatory details that will follow the larger, and much more significant, market entry question.

U.S.-owned international carriers and the United States Trade Representative have urged in this proceeding that the FCC not adopt regulatory policies that would undermine U.S. efforts to open foreign telecommunications markets to U.S. carriers. We share those concerns. Indeed, we would not support a decision that in any way limited the possible negotiating positions of the U.S. in its efforts to open foreign markets. Therefore, we emphasize that today's decision does not implicate market entry standards for foreign carriers. Rather, the Order merely implements a uniform regulatory scheme the FCC can apply to all international carriers if and when they are granted entry into the U.S. market.

A concrete example should clarify the very limited scope of today's decision. Suppose a private line reseller from a foreign country seeks authority to provide services between the U.S. and its home country. The Commission's December 1991 International Resale Order sets forth the U.S. market entry standards that govern a foreign private line reseller's ability to enter the U.S. marketplace. Specifically, equivalent resale opportunities for U.S. carriers must exist in the foreign market in order to grant the foreign carrier access to the U.S. market. If such equivalent market opportunities exist and if the foreign carrier is otherwise qualified to be a Commission licensee, then, and only then, is the FCC confronted with the issue of how to regulate the foreign carrier. Today's decision establishes the

rules as to how the carrier would be regulated -- either as a dominant or nondominant carrier -- in our market. Of course this decision does not address, nor should it, the question of appropriate market entry standards for foreign facilities-based carriers.

We are eager to eliminate all unnecessary regulatory burdens borne by foreign-owned international carriers, as well as unnecessary burdens imposed on the FCC itself. Most foreign countries, however, have not yet liberalized and privatized their own telecommunications markets, and competitive opportunities for U.S. companies abroad remain limited. Further, accounting rates with foreign telephone administrations continue to be extremely high. Indeed, despite our best efforts to the contrary, the total 1991 U.S. international settlement payments -- payments financed by U.S. businesses and consumers -- increased by 21% over 1990 levels. Even worse, the 1992 settlement payment is expected to increase to more than \$4 billion.

We remain committed to a regulatory course that will spur competition and reduce costs in the international telecommunications marketplace. Already the U.S. has the most open and advanced telecommunications market in the world. But the U.S. controls only one end of the communications pipeline. Therefore, absent concerted deregulatory efforts abroad, we believe it is unwise and antithetical to the public interest to further streamline or in any way modify entry standards for foreign-owned international carriers seeking access to the U.S. market.

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Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-360

In the Matter of

Regulation of International
Common Carrier Services

RM-7578

REPORT AND ORDER

Adopted: October 8, 1992; Released: November 6, 1992

By the Commission: Commissioner Quello concurring
and issuing a statement; Commissioners Marshall and Dugan
issuing a joint statement.

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I. INTRODUCTION

1. On January 10, 1992, we released a Notice of Proposed Rule Making to modify our current policy that treats foreign-owned U.S. common carriers as dominant in their provision of all international services to all foreign markets.¹ We proposed to regulate U.S. international common carriers, whether U.S.- or foreign-owned, as dominant only on those routes where their foreign affiliates have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services and facilities in the foreign market. We adopt this general regulatory policy, with certain modifications, for U.S. international resellers and facilities-based carriers.² We believe this action will provide significant consumer benefits, relieve U.S. carriers from unnecessary regulatory burdens, and continue to protect U.S. carriers from discrimination in access to foreign markets.

II. BACKGROUND

2. We last reviewed our Title II rate and entry regulation of U.S. international common carriers in 1985.³ In the *International Competitive Carrier* proceeding, we concluded that we should streamline regulation of those U.S. international carriers that face effective marketplace competition and do not have market power.⁴ We declined to adopt such streamlining for the provision of certain international services by particular carriers, including AT&T in its provision of international message telephone service (IMTS)⁵ and foreign-owned U.S. carriers⁶ in their provision of all international common carrier services. We maintained full Title II regulation of foreign-owned U.S. carriers because of our concern that their foreign parents had the ability and incentive to deny unaffiliated U.S. carriers operating agreements and to act in concert with their U.S. affiliates to discriminate against unaffiliated U.S. carriers in the terms and conditions of access to foreign markets.⁷

3. We initiated the instant proceeding in light of the progress that has been made to date by U.S. carriers in obtaining operating agreements, our desire to reduce regulation where the public interest permits, and our concomitant goal of encouraging competitive entry in foreign markets.⁸ We noted with favor the movement towards privatization of foreign telecommunications entities and the significant telecommunications investments made by U.S. companies in other countries since 1985. At the same time, we observed that the need to ensure nondiscriminatory treatment of U.S. carriers in foreign markets applies equally to those markets where a U.S.-owned company acquires telecommunications facilities and services. The Notice therefore proposed to change the Commission policy that imposes dominant carrier regulation based only on the existence of an ownership interest in a U.S. carrier by a foreign telecommunications entity, and instead to impose

such regulation in those instances where there is a substantial possibility of anticompetitive effects on the U.S. international service market.

III. DISCUSSION

4. In this decision, we adopt our general proposal to regulate a U.S. international carrier, whether U.S. or foreign-owned, as dominant only on those routes where a foreign affiliate of the carrier has the ability to discriminate in favor of its U.S. affiliate in the provision of services or facilities used to terminate U.S. international traffic.⁹

5. In order to implement our modified regulatory policy, we adopt a definition of affiliation that focuses on common control of the U.S. carrier and its foreign affiliate; a framework for classifying U.S. international carriers and assessing the market power of their foreign carrier-affiliates; a certification requirement to protect against third-country leveraging of foreign market power; and a presumption of nondominant regulation for those U.S. carriers that merely resell the international switched services of U.S. facilities-based carriers with which they are not affiliated. We additionally adopt a streamlined grant procedure for certain resale applications and requests to modify a carrier's regulatory status.

6. The record demonstrates that our current international dominant carrier policy is overbroad, unnecessarily burdensome and may be detrimental to competition.¹⁰ By redirecting regulation to those instances where a relationship between a U.S. international carrier and a foreign carrier may present some substantial risk of anticompetitive conduct, we promote competition in the U.S. international service market by reducing the costs of entry and operation, while continuing to protect unaffiliated U.S. carriers from discrimination by foreign carriers.¹¹ We recognize the concerns of AT&T and MCI that significant obstacles remain to achieving full and open competition in the provision of telecommunications services at the foreign end.¹² We agree that the long-term solution to foreign market power, which can be abused with or without a U.S. affiliate, is greater liberalization in foreign markets.¹³ We do not agree, however, that our regulatory objective to promote competition for the benefit of U.S. consumers is well-served by retaining dominant carrier regulation in circumstances where a carrier will not be able to exercise or benefit from market power. Moreover, we note that our dominant/nondominant regulatory analysis occurs only after we have concluded that a particular carrier should be authorized to provide international service in the U.S. market.

7. USTR, AT&T, Sprint and CWA have urged the Commission to avoid action in this proceeding that would grant unilateral and uncompensated concessions to foreign countries.¹⁴ We believe the steps we are taking here to more precisely tailor our regulatory scheme to meet desired public interest objectives are fully consistent with these requests.¹⁵ We have advised the Executive Branch of our decision and will continue to support its efforts to achieve foreign market liberalization.

A. Definition of Affiliation

(1) The Notice

8. The Notice proposed to treat a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. We also requested comment on including within the definition of affiliate any U.S. carrier: (1) that is collectively controlled by more than one foreign carrier; or (2) whose foreign carrier investment exceeds a given benchmark that may fall short of control. Regardless of the option adopted, the Commission proposed to enforce the affiliation standard by requiring each Section 214 applicant to: (1) certify whether it is affiliated with a foreign carrier in the destination market; and (2) submit ownership information identifying the U.S. carrier's principal stockholders or other equity holders and any interlocking directorates.¹⁶

(2) Positions of the Parties

9. The majority of parties that support the Notice also support our tentative conclusion that control is the proper standard for triggering a cognizable affiliation between a U.S. and a foreign carrier.¹⁷ CWCI, which otherwise supports the Notice, and AT&T, which opposes it, disagree with our proposal to focus solely on control as the measure of a carrier's incentive to participate in discriminatory conduct.¹⁸ They argue that virtually any ownership interest between carriers creates financial incentives for the carriers to act in concert to the detriment of unaffiliated carriers. DOJ counters that, absent a controlling interest by a U.S. carrier in a foreign carrier, the U.S. carrier would not have the ability to use the foreign carrier's services or facilities to favor itself.¹⁹ On the other hand, DOJ is concerned that a non-controlling ownership interest by a foreign carrier in a U.S. carrier could give the foreign carrier a financial incentive to use the bottleneck facilities it controls to discriminate in favor of its U.S. affiliate in some circumstances.²⁰

(3) Discussion

10. We affirm our tentative conclusion that control is the proper standard for determining affiliation for purposes of deciding whether a U.S. common carrier should be regulated as dominant or nondominant in its provision of U.S. international service. We therefore adopt our proposal to treat a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. In adopting this standard, we recognize the concern that a less-than-controlling interest by a foreign carrier in a U.S. carrier could give the foreign carrier the financial incentive to favor its U.S. affiliate. Absent control, however, the foreign carrier would not be in a position to direct the actions of the U.S. carrier, and we think the U.S. carrier would be unlikely to risk sanctions by this Commission for participating in discriminatory conduct that violated Commission rules or policy, or any conditions of its Section 214 certificate. We note that U.S. carriers will be subject to ongoing reporting requirements that are designed to detect discrimination by foreign carriers or administrations in favor of specific U.S. carriers,²¹ and we retain the option to impose or reimpose dominant carrier regulation on a particular carrier that is found to have engaged in anticompetitive conduct. DOJ notes as well that it has the authority to take enforcement

action under the antitrust laws in appropriate cases.²² On balance, we do not believe the possibility of anticompetitive collusion poses enough of a threat to competition to impose dominant carrier regulation absent control by a foreign carrier or a U.S. carrier, particularly in light of the substantial competitive benefits that can result from lifting the burden of current regulation. We therefore decline to broaden the scope of our affiliation standard beyond that proposed in the Notice.

11. We also decline to adopt CWCI's suggestion that we craft an affiliation standard that would capture certain non-ownership arrangements between a U.S. and foreign carrier, such as co-marketing agreements for the provision of telecommunications services or joint ventures for the provision of non-telecommunications services. Although these arrangements could provide a financial incentive for carriers to act jointly in pursuit of marketing objectives, neither carrier has the ability to direct the actions of the other or to derive a direct financial benefit with respect to the other's telecommunications operations.²³ Moreover, the U.S. carrier would in all cases be subject to the ongoing regulatory requirements we impose on all U.S. international carriers. Therefore, submission and evaluation of such arrangements would appear to require an unnecessary expenditure of Commission and carrier resources. We accordingly conclude that these arrangements do not present a substantial possibility of anticompetitive effects such that these relationships need be addressed in the context of deciding whether to regulate a carrier as dominant or nondominant.²⁴ We will rely on our Section 208 complaint procedures and sanctioning authority to remedy any anticompetitive consequences that might arise once a carrier gains access to the U.S. market.²⁵

12. We reject MCI's suggestion that we retain our current regulatory policy in light of the disagreement in the record as to the proper affiliation standard and how best to define control. We believe the legal test for control utilized in Sections 310(d) and 214(a) is workable and should be familiar to carriers, given their obligation to maintain control of their Section 214 and Section 309 authorizations.²⁶

13. We thus adopt the Notice's proposal to assess control on a case-by-case basis, consistent with this Commission's experience in interpreting Sections 310(d) and 214(a) that control is best determined in this manner. We decline to adopt NTIA's suggestion that we adopt a "presumption of control" test based on a specific percentage of stock ownership.²⁷ We recognize that in some situations the use of a benchmark can provide certainty and expedite application processing. However, given the variety of ownership structures presented by public and private corporations, partnerships and joint ventures, it is difficult to craft an ownership benchmark that could be considered a reasonable presumption for all types of business arrangements in the context of deciding whether a carrier should be regulated as dominant or nondominant. Moreover, the need to examine the *de facto* control of a carrier's operations makes it unlikely that use of a benchmark will save significant time or resources for either the Commission or carriers. We will therefore require that applicants prepare their certifications consistent with Commission precedent under Sections 310(d) and 214(a) of the Act.²⁸

14. To enforce our affiliation standard, we adopt the Notice's proposal to rely in the first instance on the submission of certifications and ownership information by applicants seeking Section 214 authorization.²⁹ While McCaw commented that it is unnecessary to require both a

certification and ownership information, no other party that supported adoption of the control test opposed this aspect of our affiliation proposal. In these circumstances, we shall retain both requirements so as to better enable the Commission to ensure against the existence of *de facto* control.³⁰

B. Market Power Analysis

(1) The Notice

15. We tentatively concluded in the Notice that traditional Title II regulation is warranted only for those routes where the U.S. international carrier has an affiliate with bottleneck control on the foreign end that could be used to discriminate against unaffiliated U.S. international carriers. We also tentatively concluded that the definition of bottleneck control should include a legally protected monopoly or monopoly in fact for the provision of telecommunication services or facilities, absent an effective regulatory regime to control the ability of the foreign carrier to discriminate.³¹

(2) Positions of the Parties

16. There is disagreement among some of the commenters about how best to assess whether the foreign carrier has bottleneck control, or market power, in the destination market. NTIA proposes a broad analytical framework for evaluating market power.³² AT&T, which opposes any change in regulatory policy, argues that the Commission should equate market power with the protected position of the foreign carrier in its market.³³ BT is concerned that we will be unable to apply a market power test in a non-discriminatory manner. It proposes that, if we adopt the test contained in the Notice, we consider whether the foreign affiliate has met certain objective criteria which can serve as benchmarks for assessing the effectiveness of government regulation.³⁴ GTE requests that we consider not only the ability of a foreign affiliate to discriminate, but also other factors, such as the presence or absence of incentives to discriminate and whether the foreign affiliate has a history of discriminating in favor of an affiliated U.S. entity.³⁵

17. NTIA and DOJ oppose relying on the effectiveness of public regulation in the foreign market as a basis for exempting an affiliated U.S. carrier from dominant carrier regulation. DOJ suggests that foreign regulatory limitations could increase rather than reduce anticompetitive incentives to recover the lost value of the foreign carrier's monopoly. It also argues that a test that relies on effective public regulation could convey to foreign governments that the U.S. is indifferent to whether they merely strengthen their regulation of monopolies or introduce competition; and, as suggested by NTIA, could implicate foreign policy considerations committed to the Executive Branch.³⁶

18. There is nearly uniform support for the proposal to limit our market power inquiry to those foreign affiliates that provide common carrier-type services or facilities.³⁷ There is less agreement on the issue whether to include within this class of services and facilities a foreign market's local or intercity access services and facilities. DOJ and NTIA suggest that foreign market power could be exercised by a carrier with a monopoly on any facilities that must be used to complete a call to a destination market.³⁸ Worldcom supports relying on our Section 208 complaint procedures to remedy discrimination in local or intercity

facilities, while TRICOM would establish a presumption that the status of services and facilities up to and including the international switch is dispositive of a U.S. carrier's regulatory status.

(3) Discussion

19. We emphasize that the market power decisions in this Order are relevant only for purposes of evaluating a carrier's status as dominant or nondominant. In this context, we adopt with certain modifications our basic proposal to regulate U.S. international carriers as dominant only on those routes where a foreign affiliate has the ability to discriminate in favor of its U.S. affiliate through control of bottleneck services or facilities in the destination market. We adopt the analytical framework proposed by NTIA to classify U.S. international carriers. We agree with NTIA that this framework should facilitate the task of determining a carrier's regulatory status by eliminating the need to make market power assessments for the majority of U.S. international carriers. Under the framework we here adopt: (1) carriers that have no affiliation with a foreign carrier in the destination market will presumptively be considered nondominant for that route; (2) carriers affiliated with a foreign carrier that is a monopoly in the destination market will presumptively be classified as dominant for that route; and (3) carriers affiliated with a foreign carrier that is not a monopoly on that route will receive closer scrutiny by the Commission.⁴⁴ We will place the burden of proof on any party, applicant or petitioner, that seeks to defeat the presumptions in the first two categories.

20. Carriers covered by the third category that seek to be regulated as nondominant bear the burden of submitting information to the Commission sufficient to demonstrate that their foreign affiliates lack the ability to discriminate against unaffiliated U.S. carriers. We expect carriers to address the factors that relate to the scope or degree of their foreign affiliate's bottleneck control, such as: the duopoly or oligopoly status in the foreign affiliate's country; and whether the affiliate has the potential to discriminate through such means as preferential operating agreements, preferential routing of traffic, exclusive or more favorable transiting agreements, or preferential domestic access and interconnection arrangements. They may also address whether public regulation in the destination market can be relied upon effectively to constrain the affiliate's ability to discriminate.⁴⁵ There would appear to be no substantial risk of discrimination, for example, where a U.S. carrier is affiliated with a foreign carrier that operates solely through the resale of an unaffiliated foreign carrier's services in a destination market that provides equivalent resale opportunities.⁴⁶

21. In adopting the foregoing factors, we agree with DOJ and NTIA that we should not as a categorical matter exclude from our market power inquiry those foreign carriers that provide only intercity or local access services or facilities. Because there is the potential for discrimination through control of such facilities, depending on the service to be provided,⁴⁷ we believe the preferred course is to examine that potential in the context of particular showings by U.S. carrier-affiliates. We also agree with DOJ and NTIA that, for purposes of evaluating an affiliated U.S. carrier's regulatory status, we should not consider the effectiveness of public regulation in the foreign market as a stand-alone test for whether a foreign carrier has the ability to exercise market power in favor of its U.S. affiliate. This

approach is consistent with the view that competition, not government regulation, is the most effective, and therefore the most desirable, solution to foreign market power.

22. We decline to adopt BT's proposal to apply dominant carrier regulation only where the foreign affiliate is not subject to government-imposed dispute resolution procedures and has not entered into multiple operating agreements, moved towards cost-based accounting rates, or adopted a policy of proportional return.⁴⁸ Compliance with these policies could suggest that the foreign carrier may not have the ability to discriminate against unaffiliated U.S. carriers; however, these policies are not exhaustive of the concerns that U.S. carriers express and that we share, such as the potential for discrimination in the quality and timing of interconnection, or the use of exclusive, indirect transiting arrangements.⁴⁹

23. We appreciate the concern of BT and MCI that the regulatory scheme we are adopting will require administrative resources and a proper understanding of foreign markets. However, as noted by NTIA and DOJ, for at least the near term most of our decisions about whether to apply dominant carrier regulation should be clear-cut: either the U.S. carrier will have a foreign affiliate that is a monopoly in a particular country (as a result of government authorization or other market failure), or it will have no affiliate at all. There should be relatively few instances where a U.S.-based carrier will be affiliated with a foreign carrier subject to competition. Thus, the required analyses should not place an excessive burden on staff (or carrier) resources in the near term.⁵⁰ As NTIA observes, when foreign market competition emerges on a wider scale, which we believe is inevitable, it may be necessary to review the regulatory policy we adopt today.⁵¹

24. As a final matter, we affirm our tentative conclusion to limit our market power inquiry to those foreign entities that provide services and facilities in the destination market that are of the type the Commission regulates in the U.S. as common carriage.⁵² Thus, we exclude from our dominant carrier regulations U.S. international carriers affiliated with foreign entities that, for example, provide or manufacture cable television services and facilities, enhanced (or value-added) services, or the hardware and software components that support the telecommunications infrastructure.

C. Third-Country Leveraging

(1) The Notice

25. Although we tentatively concluded in the Notice that our current policy was overbroad in applying dominant carrier regulation to U.S. carriers on unaffiliated as well as affiliated routes, we asked parties to comment on whether there was a substantial possibility that a U.S. carrier's foreign affiliate could successfully leverage its foreign market bottleneck into third-country markets where it has no bottleneck control. We also requested comment on whether the potential for such conduct could be offset by imposing additional traffic reporting requirements.⁵³

(2) Positions of the Parties

26. The majority of commenters support our proposed route-by-route approach. DOJ considers it improbable that a U.S. carrier could benefit from anticompetitive conduct by its foreign affiliate in a third country where the affiliate either has no market power or no bottleneck facilities. AT&T and MCI, by contrast, provide several examples of

potential third country leveraging,⁴⁹ which other commenters suggest are purely hypothetical.⁵⁰ While AT&T opposes any change in our current dominant carrier policy, it suggested in its initial comments that we could require carriers seeking nondominant status on unaffiliated routes to certify that transit, third-country calling or other concession arrangements have not been negotiated and will not be used to benefit the U.S. carrier in its operation on the unaffiliated route.⁵¹ DOJ supports and CWCI has no objection to use of such a certification; however, CWCI cautions that we not unwittingly prohibit legitimate transiting arrangements.⁵² IDB, which argues that AT&T and MCI have more leverage than any small affiliated carrier, urges that we apply any certification requirement to all U.S. carriers.⁵³

(3) Discussion

27. We cannot rule out the possibility that an affiliated U.S. carrier will attempt to gain an unfair competitive advantage on affiliated or unaffiliated routes through the negotiation of exclusive arrangements with foreign carriers or administrations. We therefore amend Part 63 of the Rules to require that Section 214 applicants with a foreign carrier affiliate in any market certify in each application filed with the Commission that they have not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any destination market served under the authority of their Section 214 certificates⁵⁴ and have not agreed to enter into such agreements in the future.⁵⁵ We define "special concession" as any arrangement that affects traffic or revenue flows to or from the U.S. that is offered exclusively by a foreign carrier or administration to a particular U.S. carrier and not also to similarly situated U.S. international carriers authorized to serve a given route. The certification will be viewed as an on-going representation to the Commission, and carriers will be required to inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission.⁵⁶

28. We believe the certification approach has several advantages over the alternatives suggested in the Notice. Unlike the proposal to require affiliated carriers to file quarterly traffic reports for all routes served, the certification reduces regulatory burdens. At the same time, the certification requirement provides a strong disincentive for an affiliated U.S. carrier to collude with a foreign carrier to gain an unfair competitive advantage in the U.S. international service market.⁵⁷ We will not hesitate to undertake an enforcement action where we are presented with evidence that an affiliated U.S. carrier has entered into such an agreement or engaged in willful misrepresentation before this Commission by failing to disclose to the Commission any such prohibited arrangements. Indeed, we reiterate that we retain the option to impose dominant carrier regulation for all routes for particular carriers found to have engaged in anticompetitive conduct. Moreover, if necessary the Commission will initiate proceedings to revoke a carrier's Section 214 authorizations to operate in the U.S. market.

D. Regulatory Treatment of Resellers

(1) The Notice

29. The Notice proposed to apply our modified policy to U.S. facilities-based carriers and resale carriers alike. We tentatively concluded that it would be difficult to distinguish a carrier's regulatory status based on the means by which it provides U.S. international service. The Notice sought comment, however, on the potential for discrimination by a foreign carrier in favor of an affiliated U.S. carrier that is merely reselling IMTS.⁵⁸

(2) Positions of the Parties

30. CWCI, GTE, McCaw, the British Embassy, BT, Worldcom and Sprint generally support regulating resellers as nondominant in the absence of an operating agreement and correspondent relationship between the reseller and foreign carrier. GTE, for example, notes that "it is the unaffiliated facilities-based carrier, not the reseller, that is negotiating the terms and conditions of interconnection with the foreign entity."⁵⁹ Commenting specifically on IMTS resellers, Sprint requests that we condition nondominant treatment of such resellers on the requirement that their foreign affiliates accept certain principles when acting as correspondents of unaffiliated U.S. international facilities-based carriers.⁶⁰ McCaw supports a route-by-route blanket exemption from dominant carrier regulation for "pure" IMTS resellers,⁶¹ while CWCI and BT would also grant such an exemption to private line resellers.⁶²

(3) Discussion

31. *Switched Service Resellers.* Given the substantial support in the record, we will presumptively treat as nondominant all U.S. international carriers, regardless of any foreign affiliations, that provide service on a particular route solely through the resale of the switched services (including IMTS) of a U.S. facilities-based carrier with which the reseller is not affiliated. We agree with the assessment of many commenters that the resale of an unaffiliated U.S. facilities-based carrier's switched services presents no substantial possibility of anticompetitive effects in the U.S. international service market, because the reseller's foreign affiliate is negotiating the terms and conditions of access to the destination market with an unaffiliated carrier on the U.S. end.⁶³ In order to favor its resale affiliate, the foreign carrier would have to reveal its intent and extend favorable treatment to the underlying U.S. facilities-based carrier. We consider it unlikely that the foreign affiliate would engage in discriminatory conduct under such circumstances.⁶⁴

32. All affiliated switched service resellers will in any event be required to certify that they will not agree to accept any special concessions from a foreign carrier or administration.⁶⁵ This requirement, in conjunction with our Section 43.51 filing requirements, should provide sufficient protection against the *de minimis* risk of discriminatory conduct by a switched service reseller or its foreign affiliate.⁶⁶ Moreover, we continue to reserve the right to impose conditions on the Section 214 authorizations of an affiliated U.S. carrier where deemed necessary to remedy use of a foreign carrier's market power against U.S. carriers generally.

33. *Private Line Resellers.* We do not agree with CWCI that the same rationale for regulating an IMTS reseller as nondominant applies to private line resellers. CWCI argues

that no policy concerns are raised until and unless a U.S. carrier enters into a correspondent relationship with a foreign carrier for direct service.⁵ However, when a U.S. carrier serves a foreign market through the resale of private line service, it must obtain from the foreign carrier(s) the foreign half circuits and any necessary local or intercity access facilities or services required to terminate U.S. traffic. Even if the Commission finds that there are equivalent resale opportunities in the foreign market,⁶ a foreign carrier that owns or controls telecommunications facilities in the destination market may have sufficient market power to discriminate among U.S. carriers in provisioning and pricing. We are not prepared at this time to presume dominant carrier regulation unnecessary to govern the operations of U.S. private line resale carriers whose foreign affiliates own or control telecommunications facilities in countries that continue to restrict competition for facilities-based carriage.

34. We recognize that a U.S. resale carrier may provide service on a given route as both a switched service and private line reseller. For example, a U.S. resale carrier affiliated with a foreign carrier that owns telecommunications facilities in the destination market may provide IMTS or telex as a switched service reseller and private line service as a private line reseller. In such circumstances, we will regulate the U.S. carrier as nondominant for the provision of IMTS or telex but assess the bottleneck control of its foreign affiliate, based on the framework described in Section III.B. above, to determine the carrier's regulatory status for the provision of private line service. However, if the carrier subsequently requests authorization to supplement its IMTS (or telex) offerings on that route through the acquisition of facilities on the U.S. end, or through the resale of private line services, we will assess the bottleneck control of its foreign affiliate to determine whether the U.S. carrier may retain its nondominant status for the provision of IMTS (or telex).⁷

E. Streamlined Processing and Other Regulatory Reforms

(1) The Notice

35. The Notice did not propose any specific reforms of our application processing procedures. Rather, we sought comment generally on the public interest benefits of modifying our current dominant carrier policy, including the elimination of unnecessary regulation.⁸

(2) Positions of the Parties

36. NTIA, the British Embassy, BT, CWCI, IDB, and McCaw urge that we reexamine in this proceeding the current regulatory filing requirements that we impose on U.S. international carriers.⁹ NTIA suggests that we retain only those filing and reporting requirements that are necessary to serve the goals underlying our regulatory classification scheme, while several of the parties offer specific proposals to reduce Title II filing and associated reporting requirements. The parties strongly support the grant of unopposed Section 214 applications within a specified timeframe.

37. By contrast, AT&T proposes that we adopt additional substantive requirements to govern the operations of affiliated carriers, particularly on those routes where they provide facilities-based, end-to-end service with their affiliates.¹⁰ AT&T argues that we should impose such rules as: separate books of account; no joint ownership of trans-

mission facilities; a requirement that the U.S. carrier use its affiliate's services only pursuant to its affiliate's published tariffs; and carrier compliance with cost allocation, customer proprietary network information and network disclosure rules. CWCI disputes that such safeguards have any relevance to the underlying concerns of this proceeding.¹¹ Sprint argues in its Reply that we should precondition any facilities-based entry by a foreign-owned carrier on the existence of "reciprocal/equivalent" market entry opportunities in that carrier's home market(s) by U.S. carriers.¹²

(3) Discussion

38. We adopt commenters' suggestions that we institute a streamlined procedure for processing certain Section 214 applications that are filed on or after the effective date of this order.¹³ Specifically, we adopt a specified timeframe for processing those unopposed Section 214 applications that seek authority to resell the international switched or private line services of unaffiliated U.S. facilities-based carriers,¹⁴ except where: (1) a private line reseller or its affiliate owns or controls telecommunications facilities in the destination country and thus may be subject to dominant carrier regulation consistent with our decision in this proceeding; or (2) the applicant proposes to resell private line service to a destination country for which the Commission has not determined as of the date of public notice of the resale application that equivalent resale opportunities exist between the U.S. and the destination country.

39. We will place on public notice for 30 days a resale application that meets these requirements and is otherwise acceptable for filing. Unless a formal opposition is filed, or unless the Common Carrier Bureau contacts the applicant in writing to the contrary, the application will be granted 45 days after the date of public notice.¹⁵ We will issue public notice of the grant on the next available list of actions taken by the Common Carrier Bureau. Commission issuance of public notice of the grant shall be deemed the issuance of Section 214 certification to the applicant, which may begin operating on the 46th day.

40. We require that resale applicants submit certain basic information to enable staff to identify those applications that are eligible for streamlined processing. Some of this information already is provided by resale applicants as a matter of course or pursuant to staff request, although Section 63.01 of the Rules may not clearly require that resellers submit such information. We therefore amend Section 63.01 of the rules specifically to require that resale applicants submit the following additional information in their Section 214 applications: (1) the type of service (switched and/or private line) that the applicant seeks authority to resell; (2) the name(s) of the U.S. carrier(s) and the specific FCC tariff(s) to be resold; (3) a certification as to whether the applicant is affiliated with the U.S. facilities-based carrier(s) whose services are being resold; and (4) where the applicant proposes to resell private line services, a certification as to whether an affiliated foreign carrier owns or controls telecommunications facilities in the destination country.

41. Several parties propose that we take certain additional steps to expedite further the processing of international Section 214 applications and initiation of service to the public. These proposals include committing processing staff to a timetable for resolving disputed applications, and adopting additional rules to deter parties from filing frivolous or "strike" petitions.¹⁶ BT additionally requests that this Commission extend its forbearance rule

to international resellers.³⁰ For the most part, these proposals go beyond the scope of this proceeding, and we will not address them here. We will, of course, make every effort to ensure that applications are processed in the most timely manner possible. The streamlined procedures adopted in this proceeding for certain resale applications should further ensure expeditious processing.

42. In requesting that we adopt in this proceeding specific conditions to govern the facilities-based operations of affiliated U.S. international carriers, AT&T and Sprint raise complex, substantive issues that are beyond the scope of this Rule Making. The merits of their arguments are better addressed in the context of applications filed by the affiliates of several foreign carriers to provide facilities-based, end-to-end service with their affiliates.³¹ AT&T also requests that we institute a "fast-track" complaint procedure as a general remedy where foreign carriers attempt to exercise market power to the detriment of U.S. interests. While we believe it is unnecessary to designate complaints of foreign market leveraging as "fast-track," all U.S. carriers and consumers should be assured that we intend to utilize our resources to act swiftly and forcefully to resolve and redress any complaints that a U.S. carrier has engaged in discriminatory conduct in collusion with a foreign affiliate.

F. Procedure for Modifying Regulatory Status of Certificated Carriers

(1) The Notice

43. The Notice proposed to amend Part 43 of the Rules to require all authorized U.S. international carriers affiliated with foreign carriers to provide a list of such affiliations within ninety days of the release date of the Report and Order adopted in this proceeding. We also proposed to require any authorized international carrier that subsequently becomes affiliated with a foreign carrier to notify the Commission within ninety days of the transaction.³²

(2) Positions of the Parties

44. No party supporting the Notice objects to the proposed information collection requirements. However, several commenters urge us to make specific findings in this proceeding as to the proper regulatory status of particular carriers under the modified policy adopted in this order, or to adopt specific procedures automatically to adjust a carrier's status based on information submitted under our new Part 43 rules.³³

45. In particular, BT, McCaw and the British Embassy urge us to determine in this proceeding that there is no substantial possibility of discrimination by United Kingdom service providers against unaffiliated U.S. carriers.³⁴ Sprint argues that its experience in seeking a U.K. license is inconsistent with BT's statements.³⁵ CWCI, which argues that its U.K. affiliate Mercury Communications, Ltd. does not enjoy equal access in the U.K., requests that we find in this proceeding that Mercury has no bottleneck control of services or facilities in the U.K. and has no ability or incentive to favor CWCI or any other U.S. carrier.³⁶ AT&T suggests that there is insufficient evidence in the record to determine that any particular U.K. carrier lacks the ability to act to the detriment of U.S. consumers and carriers.³⁷ MCI strenuously objects to consideration of any particular requests for relief in this proceeding,³⁸ including World-

com's request that we grant immediate interim waivers to carriers who ultimately would be relieved of dominant carrier regulation under our modified policy.³⁹

(3) Discussion

46. We decline to make any specific rulings as to the regulatory status of particular carriers for affiliated routes in this proceeding. We agree with AT&T and MCI that the record in this docket is not sufficient to make these rulings. We have adopted a decisional framework that we expect carriers specifically to address in support of a showing for nondominant status. Moreover, as MCI observes, the Notice did not specifically contemplate that this proceeding would provide a vehicle for resolving a particular carrier's regulatory status; thus, we believe that other parties may not have had sufficient notice that we might take such action in this docket.⁴⁰

47. We will, however, adopt a streamlined procedure for U.S. carriers to modify their regulatory status from dominant to nondominant for unaffiliated routes or affiliated routes served solely through the resale of switched or private line services (as limited in paragraph 38 above). Similar to the proposal in the Notice, any foreign-owned U.S. international carrier found to be dominant prior to the effective date of this Report and Order may file a certified list indicating those routes that it is authorized to serve for which it does not have an affiliate on the foreign end. Such filings shall include the ownership information listed in Section 63.01(r) of the Rules. A carrier may also inform the Commission, by submitting a certification, of those affiliated routes for which it provides a particular service solely through the resale of the international switched or private line services of unaffiliated U.S. facilities-based carriers. Such an affiliated U.S. carrier must also provide the "no special concessions" certification discussed in paragraph 27 above. Where the carrier resells private line services, it must additionally be able to certify, and so certify, that its foreign carrier-affiliate does not own or control telecommunications facilities in the affiliated market for which nondominant treatment is sought.

48. We will place these filings on public notice and, unless a formal opposition is filed, or unless the Common Carrier Bureau contacts the carrier in writing to the contrary, the carrier's regulatory status will be adjusted from dominant to nondominant for qualified routes and services 45 days after the date of public notice.⁴¹ Thus, a carrier that has been regulated as dominant for all international routes will be deemed nondominant for all routes for which it certifies it does not have a foreign affiliate or for which it may qualify as a nondominant reseller. If a carrier seeks to modify its regulatory status on an affiliated route for which it does not appear to qualify as a nondominant reseller, we will require that it submit a petition for declaratory ruling to do so. Alternatively, the carrier may request that we modify its status on an affiliated route in conjunction with a Section 214 filing for that route.

49. We also adopt our proposal to require that any certificated carrier that is or becomes affiliated with a foreign carrier notify the Commission within ninety days of the acquisition of such interest⁴² and submit with its notification ownership information and a "no special concessions" certification. The U.S. carrier should also certify, where appropriate, that it provides a particular service on the affiliated route solely through the resale of the international switched or private line services of unaffiliated U.S. facilities-based carriers. Where the carrier resells private

line services, it should also certify whether or not its foreign affiliate owns or controls telecommunications facilities on the foreign end.⁹³ Unless the carrier qualifies for a presumption of nondominant regulation as a switched service reseller on the affiliated route (as described in paragraph 31 above), it will be classified and its regulatory status assessed according to the framework discussed in Section III. B (see also Appendix B, Sections 63.01(r)(7), 63.10 and 63.11). We will place the carrier's notification on public notice and, if we deem it necessary, we will by written order at any time before or after the submission of public comments impose dominant carrier regulation on the carrier for the affiliated route.⁹⁴

IV. FINAL REGULATORY ANALYSIS

50. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This *Report and Order* adopts a number of the proposals made in the *Notice* to modify Commission regulation of U.S. common carriers in their provision of international service. Under the modifications adopted herein, most U.S. carriers will be classified as nondominant in their provision of international service on those routes where the carriers do not have foreign affiliates with the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities on the foreign end. The Commission declined to make findings concerning the regulatory status of particular carriers in this proceeding. Finally, the Commission modified certain Section 214 procedures to facilitate the grant of resale applications. These actions respond to commenters' concerns that current policy subjects many carriers to undue regulation.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The NPRM offered a number of alternatives for each issue raised.

V. Ordering Clauses

51. Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. Sections 151, 154, 157, 201-205, 211, 214, 218-220, 303 and 403, that the regulation of U.S. common carriers in their provision of international services shall be modified as set out above.

52. IT IS FURTHER ORDERED that the modified policy, and the rules set forth in Appendix B, regarding regulation of international common carrier services SHALL BECOME EFFECTIVE ninety days after publication in the Federal Register.

53. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

American Telephone and Telegraph Company (AT&T)

Atlantic Tele-Network, Inc. (ATN)

British Embassy

British Telecommunications plc (BT)

Cable and Wireless Communications, Inc. (CWCI)

Communications Workers of America (CWA)

GTE Service Corporation (GTE)

IDB Communications Group, Inc. (IDB)

MCI Telecommunications Corporation (MCI)

McCaw Cellular Communications, Inc. (McCaw)

National Telecommunications and Information Administration (NTIA)

Pan American Satellite (PAS)

US Sprint Communications Company Limited Partnership (US Sprint)

World Communications, Inc. (Worldcom)

Telepuerto San Isidro, S.A. (TRICOM)

Department of Justice (DOJ)

United States Trade Representative (USTR)

APPENDIX B

PART 63 - EXTENSION OF LINES AND DISCONTINUANCE OF SERVICE BY CARRIERS AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority citation for part 63 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

Source: 28 FR 13229, Dec. 5, 1963, unless otherwise noted.

2. Section 63.01 is amended by adding paragraphs (k)(6) and (r) to read as follows:

Section 63.01 Contents of Applications.

(k) ***

(6) If proposed facilities are to be acquired through the resale of the international switched or private line services of another U.S. carrier for the purpose of providing international communications services.

(i) the specific service and the type of service (switched or private line) that the applicant seeks authority to resell; and

(ii) the name(s) of the U.S. carrier(s) and the specific FCC tariffs(s) to be resold.

(r) A certification as to whether or not the applicant has an affiliation with a foreign carrier.

(1) The certification shall state with specificity each foreign country in which the applicant has an affiliation with a foreign carrier. For purposes of this certification:

(i) Affiliation is defined to include: a controlling interest by the applicant, or by any entity that directly or indirectly controls or is controlled by it, or that is under direct or indirect common control with it, in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or a controlling interest in the applicant by a foreign carrier, or by any entity that directly or indirectly controls a foreign carrier.

(ii) Foreign carrier is defined as any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1.

(2) In support of the required certification, each applicant shall also provide the name, address, citizenship and principal businesses of its 10 percent or greater shareholders or other equity holders and identify any interlocking directorates.

(3) Each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country shall additionally certify that the applicant has not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any foreign country which the applicant may serve under the authority granted under this part and has not agreed to enter into such agreements in the future.

(i) For purposes of this paragraph, and of sections 63.11(a)(2)(iii), 63.13(a)(4), and 63.14, "special concession" is defined as any arrangement that affects traffic or revenue flows to or from the U.S. that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route.

(ii) The special concessions certification required by this paragraph and by sections 63.11(a)(2)(iii) and 63.13(a)(4) shall be viewed as an ongoing representation to the Commission, and applicants/carriers shall immediately inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission.

(4) Each applicant that proposes to acquire facilities through the resale of the international switched or private line services of another U.S. carrier shall additionally certify as to whether or not the applicant has an affiliation with the U.S. carrier(s) whose facilities-based service(s) the applicant proposes to resell (either directly or indirectly through the resale of another reseller's service). For purposes of this paragraph, affiliation is defined as in paragraph (r)(1)(i) of this section, except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(5) Each applicant that certifies under this section that it has an affiliation with a foreign carrier and that proposes to acquire facilities through the resale of the international private line services of another U.S. carrier shall additionally certify as to whether or not the affiliated foreign carrier owns or controls telecommunications facilities in the particular country(ies) to which the applicant proposes to provide service (i.e., the destination country(ies)). For purposes of this paragraph, telecommunications facilities are defined as the underlying telecommunications transport means, including intercity and local access facilities, used by a foreign carrier to provide international telecommunications services offered to the public.

(6) Each applicant and carrier authorized to provide international communications service under this part is responsible for the continuing accuracy of the certifications required by paragraphs (r)(4) & (5) of this section. Whenever the substance of any such certification is no longer accurate, the applicant/carrier shall as promptly as possible and in any event within 30 days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. This information may be used by the Commission to determine whether a change in regulatory status may be warranted under section 63.10.

(7) Each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country and that desires to be regulated as nondominant for the provision of international communications service to that country may provide information in its application filed under this part to demonstrate that its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the named foreign country. See section 63.10 of this part, Regulatory Classification of U.S. International Carriers.

(i) Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, such as:

(AA) the monopoly, oligopoly or duopoly status of the destination country; and

(BB) whether the foreign affiliate has the potential to discriminate against unaffiliated U.S. international carriers through such means as preferential operating agreements, preferential routing of traffic, exclusive or more favorable transiting agreements, or preferential domestic access and interconnection arrangements.

(ii) Such a demonstration may also address other factors the applicant deems relevant to its demonstration, such as the effectiveness of public regulation in the destination country.

3. Section 63.10 is redesignated section 63.15 and new sections 63.10, 63.11, 63.12, 63.13, and 63.14 are added to read as follows: